Supreme Court, U.S.
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No.

IN THE UNITED STATES SUPREME COURT

DWAIN MERCER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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January 25, 2005

QUESTIONS PRESENTED FOR REVIEW

1. Is the opinion of Court of Appeals for the District of Columbia in direct conflict with the decision in *Crawford v. United States,* 541 U.S. 36 (2004) when it permitted the use against the Petitioner as direct evidence of guilt at trial, the prior grand jury testimony from a government witness under the guise of impeachment of that witness who claimed she could no longer remember her grand jury statements?

2. Is there a conflict between the decision in *Crawford v. United States*, 541 U.S. 36 (2004) which restricted the use at trial of unexamined out of court statements and the District of Columbia Court of Appeals view of the holding of *Owens v. United States,* 484 U.S. 554 (1988) which allowed the use of out of court statements if the declarant appeared at trial and made himself available for cross examination?

ALL PARTIES TO THE PROCEEDINGS BELOW

The following appeared as parties below: Dwain Mercer and the United States of America.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Appendix A) is reported at 860 A.2d 849 (D.C. 2004). The order denying rehearing is not reported and can be found in Appendix B.

BASIS FOR JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on September 2, 2004. A petition for rehearing was denied on October 27, 2004. Jurisdiction is based on 28 U.S.C. 1257.

APPLICABLE PROVISIONS

United States Constitution, Amendment VI

STATEMENT OF THE CASE

Petitioner was convicted in the Superior Court for the District of Columbia in the year 2000 on a charge of second-degree murder while armed and sentenced in January of 2001 to twenty years to life on that offense.

On appeal to the District of Columbia Court of Appeals, the Petitioner sought a new trial based in part on the government use of prior recorded statements made by witnesses unavailable for trial. After submission of initial briefs and oral argument, this Court decided the case of *Crawford v. Washington* and the Court of Appeals ordered a supplemental briefing to address the applicability of that decision to Petitioner's argument.

On September 2, 2004, the District of Columbia Court of Appeals issued a decision which concluded that the use of prior statements by an unavailable witness to convict the Petitioner was permissible under the doctrine of *United States v. Owens*, 484 U.S. 556 (1988) and affirmed his convictions. A petition for rehearing was denied on October 27, 2004.

STATEMENT OF FACTS

On April 2, 1996, Dwain Mercer and a co-defendant were indicted for first degree murder while armed and weapons offenses in the death of Omar Johnson. After a jury trial in 1996, the Petitioner and his co-defendant were convicted on second-degree murder and related weapons offenses.

An appeal of this conviction to the Court of Appeals for the District of Columbia resulted in a reversal because the jury based its verdict partly on inadmissible evidence about a plot to intimidate witnesses. *Mercer v. United States*, 724 A.2d 1176 (D.C. 1999).

At his second trial, the government sought to use first trial witness Linda Washington to establish that the Petitioner shot the victim. Ms. Washington had testified at the first trial that she had seen the Petitioner immediately after shots were fired with a gun in his hand. At the second trial Ms. Washington appeared to testify, but asserted that a head injury and series of strokes since the first trial had left her unable to recall in any meaningful way either the events of the shooting or her first trial testimony.

Both Petitioner and the government agreed to stipulate that Ms. Washington was "unavailable" within the meaning of the law and thereby allowing the government to make use of her testimony from the first trial. When the government then announced that it wanted to impeach Ms. Washington with her prior grand jury testimony–in which she claimed that she

actually saw the Petitioner shoot the victim–counsel for Petitioner objected.

The trial court agreed with the prosecutor and ruled that the government could use the grand jury testimony once it laid a proper foundation by introducing the witness' first trial testimony in which she acknowledged that she could not recall testifying before the grand jury.

The prosecutor then asked Ms. Washington if she recalled the shooting or testifying in the first trial. She responded that she did not recall the murder; that she remembered coming downtown but nothing more about the grand jury appearance and that she recalled coming to court, but nothing more about her first trial appearance. When asked specifically if she recalled testifying in the first trial that she had appeared before the grand jury in June of 1996, she replied that she did not "remember the case at all."

Immediately after this response, the government was permitted to read into evidence the grand jury testimony of Ms. Washington that she saw the Petitioner shoot Omar Johnson. The jury was then instructed by the trial court that it could consider the grand jury testimony as either impeachment or substantive evidence in the murder charge against the Petitioner.

Petitioner was convicted again of second-degree murder and weapons offenses and is currently serving a sentence of twenty seven years to life.

REASONS FOR GRANTING THE WRIT

The District of Columbia Court of Appeals began its consideration of Petitioner's appeal before this Court's decision in *Crawford*. Subsequent to the release of the *Crawford* opinion, the Court of Appeals asked the parties to brief the case in light of the holding of *Crawford*. In September of 2004, the

Court of Appeals filed its opinion in which it concluded that the use of the prior statements in Petitioner's trial was consistent with *United States v. Owens*, 484 U.S. 554 (1988).[1] Petitioner believes that the Court of Appeals failed to appreciate the reasoning of *Crawford* and affirmed a result that is in direct conflict with that opinion.

At the close of the *Crawford* opinion, the majority decision recognized that the use of grand jury testimony and former trial testimony are two of the modern practices with the closest kinship to the abuses to which the Confrontation Clause was originally directed. 541 U.S. at 53. Although *Crawford* involved a police statement not under oath, the prohibition for its use at trial remains equally strong in the Petitioner's case: the grand jury testimony of Ms. Washington which established him as the shooter was not subject to the cross examination of counsel for the Petitioner.

While it is true that Petitioner could examine Ms. Washington at his second trial, he was faced with the loss of memory response that made cross examination meaningless. This would not have represented a problem if he was faced only with cross examining her second trial testimony. Nor would it have called the Confrontation Clause into question if Ms. Washington was impeached at the first trial with her grand jury identification. But she was not and so counsel in the first trial had no opportunity to explore this issue at the first trial. The result is that Petitioner was convicted on evidence produced by calling an essentially mute witness whom the government

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1 Petitioner also notes that the Linda Washington grand jury testimony objection was not the only example of unavailable witness evidence presented against the Petitioner. He also objected at trial, and the Court of Appeals examined, three other government witnesses at his trial whose prior first trial testimony was read to the second trial jury because they were declared unavailable for the second trial. 2004 D.C.App.Lexis 579, *8.

impeached with damming grand jury identification testimony which he was never able to cross examine. This is precisely the situation which *Crawford* declared to be protected by the Sixth Amendment.

The Court of Appeals is correct when it writes that *Crawford* did not specifically overrule *United States v. Owens,* 484 U.S. 554 (1988). Because *Owens* relied on a concept other than the test of *Ohio v. Roberts*, 448 U.S. 56 (1980), to affirm the trial use of a hearsay statement for a victim who subsequently lost his memory of events, the *Crawford* court may have felt no immediate need to address the status of *Owens* in light of the historical analysis of the Confrontation Clause contained in *Crawford.*

The District of Columbia Court of Appeals appears to suggest in its opinion that because Ms. Washington was physically present at the second trial, the right of confrontation is not violated. *Crawford* is at odds with such a conclusion and plainly requires the opportunity for cross examination be present at the prior testimonial occasion which in this case was the secret grand jury proceeding. 158 L.Ed.2d at 203.

While *Owens* may not be the direct fit with the present case which the Court of Appeals claims it is[2], the operative facts are close enough to call into question the continued validity of *Owens* when challenged under the *Crawford* analysis. If the FBI agent's statement of identification in *Owens* were to be examined under the Confrontation Clause historical analysis of *Crawford*, Petitioner suggests the outcome in *Owens* would be different.

It is of significance that one of the examples used in

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2 One of the major differences is that the *Owens* FBI statement was not made under oath. The Linda Washington grand jury statement was under oath and the trial court instructed the jury that it could consider the grand jury identification as substantive evidence of the Petitioner's guilt.

Crawford of past Confrontation Clause abuse is *United States v. Papajohn*, 212 F.3d 1112 (8th Cir. 2000), in which prior grand jury testimony was read to the trial jury when the declarant was physically available but invoked his Fifth Amendment right to remain silent when called by the government. *Id.* at 1116.

The right of confrontation guaranteed by the Constitution is not met in a case in which the witness against a defendant speaks through a transcript from a proceeding at which no representative of the defendant was present. The Sixth Amendment protects that right sufficiently to "afford the trier of fact a satisfactory basis for evaluating the truth of a prior statement." *California v. Green*, 399 U.S. 149, 161 (1970) No such basis can be found under these circumstances.

The fundamental purpose of the prior opportunity to cross examine rule is to ensure that the former testimony was endowed with some indicia of reliability so that the trier of fact has a basis for evaluating the truth of the prior statement. *Mancusi v. Stubbs*, 408 U.S. 204 (1972) That indicia is absent in the present case.

Prior decisions of this Court have repeatedly utilized the term "effective" cross examination in describing this right. *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985); *California v. Green*, 399 U.S. at 159. There could be no effective cross examination as contemplated by the Constitution under the circumstances presented with Ms. Washington's grand jury testimony at Petitioner's trial.

CONCLUSION

The facts of the present case demonstrate that while there may be a tension between *Owens* and *Crawford* when both are examined under the same standard, the underlying directive of *Crawford* is clearly in conflict with the District of Columbia Court of Appeals decision in this case and the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Atlantic and Maryland Reporters. Users are requested to notify the Clerk of the Court of any formal errors so that corrections may be made before the bound volumes go to press.

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 01-CF-330 & 01-CO-1122

DWAIN MERCER, APPELLANT,

V.

UNITED STATES, APPELLEE,

Appeals from the Superior Court of the
District of Columbia
(No. F-1061-96)

(Hon. Judith E. Retchin, Trial Judge)

(Argued December 17, 2003 Decided September 2, 2004)*

Judith A. Lovelace, appointed by the court, for appellant.

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* The decision in this case was originally released as a Memorandum Opinion and Judgment. The court has granted the appellee's motion to publish.

Bernard J. Delia, Assistant United States Attorney, with whom *Roscoe C. Howard, Jr.*, United States Attorney at the time the brief was filed, and *John R. Fisher* and *Elizabeth Trosman,* Assistant United States Attorneys, were on the brief, for appellee.

Before FARRELL and WASHINGTON, Associate Judges, and KING, Senior Judge.

PER CURIAM, Dwain Mercer and Antonio Terrell were indicted on April 12, 1996, for the first degree murder[1] while armed and associated weapons offenses related to the shooting death of Omar Johnson that occurred on June 1, 1995. After a jury trial, Mercer was convicted of second-degree murder and weapons offenses. On appeal, Mercer's convictions were reversed, *Mercer v. United States*, 724 A.2d 1176 (D.C. 1999). Mercer was tried again in May 2000, and again convicted of second-degree murder and the weapons offenses.[2] A timely notice of appeal was filed. Subsequently, Mercer filed a pro se motion to vacate his conviction pursuant to D.C.Code §23-110 (1981) which was denied without a hearing. A timely notice of appeal was filed and the two appeals were consolidated.

In the direct appeal, Mercer claims that the trial court committed reversible error in admitting the prior recorded

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1 See, D.C.Code §§ 22-2401, -3202 (1981), *recodified at* D.C.Code §§ 22-2101, -4502 (2001) respectively.

2 Terrell was also convicted of second-degree murder and weapons offense at the first trial, but his convictions were affirmed on appeal. Terrell testified for the government at the second trial with the understanding that the government would inform the judge who was considering his motion to reduce sentence of his cooperation.

testimony of four witnesses at his murder trial. He also contends the court erred in denying his post-conviction motion. We affirm.

I

Mercer first contends that the trial court erred in admitting the grand jury testimony of a witness, Linda Washington, who had testified at the previous trial and who appeared as a witness at the second trial. Washington was declared unavailable at the second trial, however, because having recently suffered a head injury and a series of strokes, she was unable to recall in any meaningful way the events of the day of the shooting, her testimony before the grand jury, or her testimony at the first trial. The government use the prior trial testimony—where Washington admitted testifying before the grand jury– to lay the foundation to impeach her claim at the second trial that she could not recall testifying before the grand jury. After she testified that she could not "remember the case at all," the government was permitted to read a portion of the grand jury testimony in which she said she saw Mercer shoot the victim.

The jury was later instructed that if it found the grand jury testimony inconsistent with the witnesses' present testimony in court, it could consider the inconsistency both in judging the credibility of the witness at the trial and as proof that what was said before the grand jury was true.

Mercer contends that the trial court erred in allowing the government to impeach Washington with her grand jury testimony because he had no opportunity to cross-examine Washington's grand jury testimony, and as a result since the witness was unavailable, only the prior trial testimony should have been allowed. We do not agree.

Because Washington was unavailable,[3] the trial judge did not err in allowing the government to use her prior trial testimony, where she stated that she recalled testifying before the grand jury, to lay the foundation for the introduction of her grand jury testimony. *See Bedney v. United States*, 684 A.2d 759, 763 (D.C. 1996). Nor did the trial judge err in admitting the grand jury testimony under D.C.Code § 14-102 (b) (1996) as a prior inconsistent statement and as a substantial evidence. Under § 14-102 (b) a witness's prior statement may be introduced as substantive evidence if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . inconsistent with the declarant's testimony, and given under oath subject to the penalty of perjury at a trial, hearing or other proceeding. . ." *McConnaughey v. United States,* 804 A.2d 334, 340 n.5 (D.C. 2002). It is settled that grand jury testimony, assuming all other requirements are met, is admissible as substantive evidence under D.C.Code § 14-102 (b) . *Id.*

All the statutory requirements were met. At the second trial, Washington testified that she had no memory of what happened the night of the murder. Before the grand jury, however, she testified that she saw Mercer shot the victim. Thus, her grand jury testimony contradicted her trial testimony and was therefore admissible as a prior inconsistent statement under § 14-102 (b). *See Mercer*, 724 A.2d at 1195-96; *United States v. Owens*, 484 U.S. 556, 563 (1988). *See also, United States v. Milton*, 303 U.S.App.D.C. 386, 393-94, 8 F.3d 39, 46-47 (1993), *cert. denied*, 513 U.S. 919 (1994)(grand jury testimony admitted as prior inconsistent statement where witness testified she remembered almost nothing about the

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3 Mercer stipulated that Washington was unavailable. In addition, his counsel used Washington's prior trial testimony in cross examining her at the second trial.

incident or what she told the grand jury); *United States v. Bigham*, 812 F.2d 943, 946-47 (5th Cir. 1987)(grand jury testimony of witness that he saw assault was admitted where witness testified at trial that he had no recollection of incident).

In addition, Mercer's counsel cross-examined Washington at the second trial with respect to her prior knowledge of the murder. For example, Washington gave an affirmative answer at the second trial when asked whether she recalled testifying at the first trial that she had not seen Mercer shoot the gun. That testimony directly contradicted Washington's grand jury testimony that was used for impeachment.

Mercer argues that Washington's grand jury testimony was not admissible because it was not subject to cross examination. The operative question, however, is not whether the witness was cross examined before the grand jury, but whether the witness was subject to cross examination at trial. While it may be a "semantic inconsistency" or a "verbal curiosity," its is possible, and in fact not uncommon, for a witness who appears at trial to be considered unavailable for some purpose, but deemed available for and subject to cross-examination. *See Owens*, 484 U.S. at 563-64.[4]

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4 Subsequent to oral argument in this case the Supreme Court decided *Crawford v. Washington,* 124 S.Ct.1354, 1369 n.9 (2004), and we requested supplemental briefing from both parties. In *Crawford*, the Supreme Court affirmed the principle that "when a declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* (citing *California v. Green*, 399 U.S. 149, 162 (1970). We are satisfied that the requirements of *Crawford* were met here. Nothing in that opinion suggests that the Court intended to limit its holding in *Owens, supra*, and we are bound to follow Supreme Court precedent unless it is expressly limited or abandoned. *See Agonstini v. Felton,* 521 U.S. 203 (1997). In *Owens*, a witness

Accordingly, we conclude that the trial court properly admitted Washington's prior trial testimony on the grounds that she was unavailable and properly admitted the grand jury testimony as an inconsistent statement.

II

A.

Mercer next challenges the use of the prior trial testimony of three other witnesses, Robin Motley, Natasha Stringfellow and Dominic Gibson, each of whom testified at the first trial but were unavailable at the second trial.[5] The

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who had given a prior identification of an individual was not able to recall making that prior identification when called at trial due to memory loss. The defendant argued that the memory loss suffered by the declarant precluded him from being cross examined. The Supreme Court held that those circumstances, which are essentially what occurred here, do not present Confrontation Clause problems. "It is sufficient that the defendant has the opportunity to bring out matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and event what is often a prime objective of cross examination . . . the very fact that he has a bad memory. [T]he ability to inquire into these matters suffices to establish the constitutionally requisite opportunity for cross examination . . . [even] when the witness's past belief is introduced and he is unable to recollect the reason for that past belief." *Owens*, 484 U.S. at 564.

5 Robin Motley and Natasha Stringfellow did not respond to subpoenas ordering them to appear to testify, and repeated efforts to locate them were unsuccessful. Accordingly, both sides agreed with the trial judge's determination that those two witnesses were, as a matter of law, unavailable to testify at the second trial. The third witness, Dominic Gibson, appeared at the second trial but refused to take the oath and repeatedly refused to testify. Both sides agreed with the trial judge's determination that Gibson was unavailable to testify at the second trial.

testimony of each was admitted under the prior recorded testimony exception to the hearsay rule. Mercer contends that the testimony of those witnesses should not have been admitted because the cross examination at the first trial was inadequate. In addition, with respect to Gibson, Mercer claims that evidence adduced at the second trial rendered the first trial cross-examination of Gibson ineffective, and with respect to Motley, Mercer challenges the admissibility of three specific statements within her prior testimony on separate grounds.

As we said before, prior recorded testimony is admissible as an exception to the hearsay rule under D.C.Code § 14-303[6] if the proponent establishes that
(1) the direct testimony of the declarant is unavailable; (2) the previous testimony was given under oath or affirmation in a legal proceeding; (3) the issues in the two proceedings were substantially the same; and (4) the party against whom the testimony is now offered had the opportunity to cross examine the declarant at the former proceeding.

Feaster v. United States, 631 A.2d 400, 405 (D.C. 1993)(internal citations omitted). We review a trial court's determination to admit or deny evidence under this exception

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6 See D.C.Code § 14-303. Testimony of deceased or incapable person.

When a party, after having testified at a time while he was competent to do so, dies or becomes incapable of testifying, his testimony mayn be given in evidence in any trial or hearing in relation to the same subject matter between the same parties or their legal representatives, as the case may be; and in such a case the opposite party may testify in opposition thereto.

for abuse of discretion, and also treat the determination as a factual finding to be reversed only if it is "plainly wrong or without evidence to support it." *See Skyers v. United States,* 619 A.2d 931, 934 (D.C. 1993)(noting "some conflict in our decisions concerning the applicable standards of review.")

Mercer does not challenge the determinations that each of these three witnesses was unavailable nor does he claim that the prior testimony was not given under oath at a judicial proceeding. Further, he concedes that at the first trial he had an opportunity to cross examine each of these witnesses. *Skyers,* 619 A.2d at 934. Mercer argues, however, that the prior testimony of each of these three witnesses should not have been admitted at the second trial because the prior testimony was given at the first trial which involved Mercer and his co-defendant, Melvin Terrell. Mercer argues that because the first trial involved a co-defendant, the issues were not the same. This argument is without merit.

In satisfying this prong of the prior recorded testimony admissibility test, we have never required the issues and parties to be identical; we have only required that the issues be "substantially similar." *Epstein v. United States,* 359 A.2d 274, 277 (D.C. 1976). The issues in the second trial were indeed substantially similar, as the charges were essentially identical[7] and the evidence was largely the same. Mercer makes the conclusory statement that the two trials differed because the fist involved a co-defendant, but does not specifically say how the

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7 At the second trial, the lead charge was second-degree murder while the lead charge at the first trial was first degree murder. The jury at the first trial, however, found Mercer guilty of second-degree murder as a lesser included offense of first-degree murder.

trials differed.[8] At the first trial, each of these three witnesses offered testimony that in some way implicated Mercer, and Mercer availed himself of the opportunity to cross-examine each witness on all of their testimony. *See Skyers*, 619 A.2d at 934. This full cross-examination[9] "comported with the principal *purpose* of cross-examination: to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed." *Feaster,* 631 A.2d at 406-07 (quoting *Ohio v. Roberts,* 448 U.S. 56 (1980))

Accordingly, because the issues in the second trial with respect to Mercer were substantially similar to those as in the first trial, where Mercer had an opportunity to cross-examine each of the witnesses in question, we conclude that the trial court did not abuse its discretion in admitting the prior trial testimony of each of the unavailable witnesses.

B.

Mercer also challenges portions of Dominic Gibson's testimony on an alternate theory, specifically that new evidence was introduced in the second trial, and Mercer never had an opportunity to cross examine Gibson with regard to that evidence. The "new evidence" came in the form of testimony

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8 *See, e.g. United States v. Licavoli*, 725 F.2d 1040, 1048-49 (6th Cir. 1984)(the introduction of additional charges at a subsequent trial of same defendants did not substantially alter the issues in the case, therefore, prior trial testimony was admissible).

9 Because a complete cross-examination was conducted at the first trial, the requirements set forth in *Crawford* were met.

offered by Antonio Terrell, who was Mercer's co-defendant at the first trial. Terrell did not testify during the first trial.

Mercer argues that certain statements made by Terrell during his testimony contradicted statements made by Gibson during the first rial with regard to the issue of whether Gibson entered Terrell's car after Johnson was shot, and if so, when that action occurred. Mercer argues that this "contradiction" undermines Gibson's credibility as a witness, and that he was deprived of an opportunity to cross examine Gibson on this point to show possible bias. This argument fails for several reasons.

First, it is not clear that Gibson's and Terrell's statements contradict each other, as it is reasonable to conclude that the apparent contradiction regarding Gibson's whereabout during a certain period of the time stemmed from the fact that the two individuals were actually referring to different periods of time.[10] However, even if we credit Mercer's contention that the testimony of the two witnesses presents a bona fide contradiction, the argument is still without merit. Gibson's trial testimony was properly admitted as prior sworn testimony of an unavailable witness, and there is no general exception to the admission of such evidence on the grounds that it may be contradicted by testimony at the subsequent trial.

Moreover, Mercer does not suggest that the alleged discrepancy regarding Gibson's presence in Terrell's automobile pertains to a relevant factual issue in the case; it is clear that Omar Johnson was shot before Gibson either did or did not get into Terrell's automobile. Mercer only argues that his lack of opportunity to cross-examine Gibson on this asserted

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10 At the second trial, Terrell stated that Gibson joined the men in his car as they left the scene of the murder. Mercer argues that this statement contradicts Gibson testimony where he stated that he was inside the apartment at the time of the murder.

discrepancy deprived him of an opportunity to undermine Gibson's overall credibility. The factual "contradiction" involved an entirely peripheral matter, and we are satisfied that exposing such a contradiction would not call the witnesses' overall credibility into question to any extent. Furthermore, contrary to what he now suggests, Mercer did in fact avail himself of the opportunity to use this "contradiction" to undermine Gibson's credibility – during closing argument Mercer's counsel brought up the possible discrepancy, and, in fact, suggested to the jury that such a contradiction called Gibson's credibility into question.

Accordingly, for all the reasons stated, we conclude that the trial judge did not abuse her discretion in admitting Terrell's testimony regarding Gibson's whereabout immediately after Omar Johnson's shooting.

C.

Mercer also contends that thee statements in Robin Motley's testimony from the first trial, which were admitted at the second trial pursuant to D.C.Code § 14-303, constituted inadmissible hearsay.[11] After establishing that Motley was unavailable at the second trial, the trial judge asked both sides if they objected to admitting any statements from Motley's former testimony. Mercer cited three statements, and argued that each constituted inadmissible hearsay and should not be admitted. We disagree.

Hearsay is an assertion of fact or belief made out of court and offered to prove the truth of the matter asserted. See *Laumer v. United States,* 409 A.2d 190, 194 (D.C. 1979)(*en banc*). The first statement pertained to Motley's observations

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11 Under the "double hearsay" doctrine, any statements admitted as admissible hearsay under one hearsay exception (in this case the former testimony exception of D.C.Code § 14-303) must also satisfy requirements of any applicable hearsay exceptions.

regarding a gun which Omar Johnson brought into her apartment. Mercer argues that Motley's observations on this point constituted hearsay because Motley had no first-hand knowledge regarding the gun.

When asked at the first trial if she knew "whether or not [Omar Johnson] had a gun on him," Motley responded that she knew that he did because Johnson asked Motley if he "could put it up while I take loose his hair." and that Mercer then put his gun "in the middle of the room" in her apartment. The trial judge found that "it appears that [Motley] has first-hand information about what she observed and the testimony will be allowed." We concluded that the record clearly demonstrates that Motley was able to offer first-hand observations regarding the gun, and therefore, the trial court did not commit error in finding that her statements were not hearsay.

Mercer also contends that Motley's statement that Gibson had said to her, "Robin tell [Omar Johnson] that [Mercer] wants him, " should not have been admitted because it is inadmissible hearsay. The trial judge admitted his statement subject to a limiting instruction that it was not offered for the truth of the matter asserted (that Gibson made the particular statement to Motley), but rather to show why Johnson went outside (presumably because Gibson asked him to come out). "If a statement is not offered to prove the truth of the matter asserted, it is not hearsay." *Burgess v. United States,* 786 A.2d 561, 570 (D.C. 2001)(citing *Perritt v. United States*, 640 A.2d 702, 704 (D.C. 1994)). We presume that the jury will follow limiting instructions given by the court. *See Weeda v. District of Columbia,* 521 A.2d 1156, 1163 (D.C. 1987). The jury was instructed that the statement could only be considered to show why Johnson had gone outside. Accordingly, we conclude that the trial court did not err in admitting his statement.

Mercer also argues that the trial court improperly admitted Motley's testimony where she asserted that Johnson

told her that he was going to get something out of one of the rooms in her apartment. The trial court found that this was a statement reflecting Johnson's then present state of mind, and admitted the testimony pursuant to the hearsay exception for statements made reflecting present state of mind.

The statement reflected Gibson's intention to retrieve an object from Motley's home . He had not yet performed this act, so the statement constituted an assertion of hi future intent, as opposed to an explanation of past actions. A "declarant's expression of intention to perform an . . . act increases the likelihood that the declarant did so. Such expressions are admissible under the 'state of mind' exception to the hearsay rule" *McBride v. United States*, 441 A.2d 644, 651-52 (D.C. 1982)(citations omitted). Accordingly, we likewise conclude that the trial court did not err in admitting this statement as a statement of present state of mind.

III

Mercer also argues that the trial court committed error in denying, without a hearing, his motion for a new trial pursuant to D.C.Code § 23-110. In the motion, Mercer argued that his lawyer was ineffective because he did not investigate the case and present a reasonable defense; did not call certain witnesses; and did not share certain discovery materials with Mercer. We conclude that Mercer's arguments are without merit.

Our review of a trial court's determination of whether counsel was ineffective presents a mixed question of law and fact; we will accept the trial judge's factual findings unless they lack evidentiary support in the record, and on those facts, we will conduct a *de novo* review of the trial court's legal conclusions. *See Byrd v. United States*, 614 A.2d 25, 30 (D.C. 1992); *Frederick v. United States,* 741 A.2d 427 (D.C. 1999). See also D.C.Code § 17-305; Super Ct. Civ.R. 52(a).

In order to prevail on a § 23-110 motion alleging

ineffective assistance of counsel, a movant must demonstrate that trial counsel's performance was deficient and prejudicial. *Byrd*, 614 A.2d at 29. Furthermore, such review will not proceed in a fashion so as to effectively second-guess strategic decisions made by trial counsel. *Id; Woodard v. United States*, 738 A.2d 254, 257 (D.C. 1999).

Mercer argues that his attorney did not prepare for the second trial but rather assumed that the second trial would be a "mirror image" of the first trial. The record does not support that claim. While evidence at the second trial was substantially similar to the evidence at the first trial, the one major difference was that Mercer's co-defendant in the first trial, Melvin Terrell, testified at the second trial. The record is clear, however, that Mercer's counsel was prepared for Terrell's testimony.

For example, the record indicates that Mercer's counsel familiarized himself with the details of Terrell's' arrangement with the government in exchange for his testimony at the trial and that he cross-examined Terrell on this arrangement in order to discredit his testimony. Furthermore, during trial Mercer's counsel argued that certain statements made by Terrell at the second trial conflicted with statements he had previously made to the police. Accordingly, the trial court was not in error in denying Mercer's motion based on his counsel's asserted unpreparedness and failure to present a reasonable defense.

Mercer's other arguments alleging ineffectiveness are also without merit. He cites his counsel's failure to share certain discovery documents with him, but does not specifically identify which documents he is talking about.[12] This argument is too vague to have any merit. He also cites his counsel's failure to call a certain alibi witness, Ms. Ferrell, who based on

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12 Mercer's release status at the time of the second trial was community supervision. Mercer appeared at the first two days of the trial but voluntarily absented himself for the remaining four days of trial.

her first trial testimony would have stated she heard "popping sounds" which may have come from the television. Even if we assume that Ms. Ferrell would have testified consistent with her testimony at the first trial, her alternative explanation of the source of the gunshots does very little to rebut the statements of numerous witnesses who testified that they observed "live" gunshots in front of the apartment building. Accordingly, we conclude that Mercer did not suffer any prejudice by his attorney's decision not to call Ms. Ferrell.

Finally, Mercer argues that the trial court committed error by denying his § 23-110 motion without a hearing. While we have held that there is a presumption in favor of holding a hearing on § 23-110 motions alleging ineffectiveness of counsel when the motion pertains to matters outside the record, *see Spencer v. United States*, 748 A.2d 940, 948-49 (D.C. 2000), we have also held that a hearing is not required where certain claims are asserted, including those that assert "vague and conclusory allegations." *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993) We have also held that a hearing may not be required when the § 23-110 motion can be resolved on the basis of the available record.

As we have discussed above, Mercer's claims either fit in the category of "vague and conclusory" (the claim that his attorney failed to show him certain undisclosed documents), or can be resolved on the available record (the claim that his attorney was unprepared for Melvin Terrell). Accordingly, we conclude that the trial court did not commit error in deciding the motion without a hearing.

Affirmed.

District of Columbia
Court of Appeals

Nos. 01-CF-330 and 01-CO-1122

DWAIN MERCER,

Appellant,

F1061-96

File Stamped
Oct 27 2004

v

UNITED STATES,

Appellee.

BEFORE: Wagner, Chief Judge; Terry, Schwelb, *Farrell, Ruiz, Reid, Glickman, and *Washington, Associate Judges; *King, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, it is

ORDERED, by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM